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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1407

RODMAN & RENSHAW,

Petitioner,

vs.

ROBERT AND SANDRA SCHAEFER, ET AL.,

Respondents.

PETITIONER'S REPLY TO MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION.

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The Memorandum filed on behalf of the Securities and Exchange Commission, self described as Amicus Curiae, does not measure up to its label. To paraphrase Chief Judge John R. Brown's story,[1] the Commission is no more a friend of this court than Rodman. In fact, if fidelity to legal reality is a touchstone of such friendship, the Commission is less a friend than many an avowed partisan, including Petitioner. The Commission's Memorandum is noteworthy for its failure to respond to Petitioner's authority and for its misleading citation and quotation from what it presents as authority adverse to Petitioner's position.

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1. Recounted in his address to the Labor Law Section, *American Bar Association,* Labor Law Section Report, 1969, pages 175, 176. He asked a lawyer during argument before the Fifth Circuit Court of Appeals what he had to say about a brief of amicus. The lawyer responded, "Judge Brown, I want to tell you one thing. That man is no more a friend of this Court than I am."

so manifested impairs the orderly application of the federal securities laws is not explicated by the Commission.

B.

The Commission is correct (Memo. pp. 4 and 5) when it states that the Courts of Appeals have uniformly held that local statutes of limitations apply to actions brought under § 10(b) and Rule 10(b)(5). The Commission is apparently unperturbed by the lack of an "orderly application of the federal securities laws" resulting therefrom. As noted in the Petition, not only has this resulted in the almost accidental application of limitations of a forum of plaintiffs' choice but has also caused needless litigation as to which statute of the forum state to apply.

Further, the federal policy of adopting "the local law of limitations" noted in *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395, relied upon by the Commission, has never to the best of counsels' knowledge been applied by this Court where a federal policy of limitations has been as near at hand as in the specific limitations periods of the Securities Acts. When Congress has explicitly enunciated its own policy of limitations, as it has done in the Securities' Acts, that enunciation should convey a plainer message than that presumed from Congressional silence.

The failure of Congress to provide a limitations statute for actions grounded on Rule 10(b)5 "even after widespread judicial recognition of an implied right of action under that section" is footnoted by the Commission (Memo, p. 4) to Congressional action in 1938, amending § 29(b) to provide for limitations for other proscribed conduct. If the intended inference is that Congress so acted, *after* "widespread judicial recognition" of a 10(b)5 action, and omitted to act with reference to 10(b)5, it must be noted that it was not until 1946 in *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 519 (E. D. Penn.) that any such private right of action was discerned by any court. If that is not the intended inference, the footnote has no relevant message.

Finally (Memo, p. 5), the Commission professes to perceive a third possibility. This alternative, the Commission says, is that, even if the manipulation here was governed by § 9(e)'s limitations (whether brought pursuant to § 9 or Rule 10(b)(5)), that limitations period should not apply to an action "based upon a broker-dealer's alleged failure to adequately supervise the conduct of its employee." If the Commission is suggesting that still another statute of limitations might apply,[4] its position is untenable. § 20 of the 1934 Act (15 U. S. C. 78t) provides for vicarious liability "unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or causes of action."

Presumably, Rodman's liability for inadequate supervision would arise under this section, but, most assuredly the timeliness of suit against it, if otherwise governed by § 9, would also be governed by § 9's limitations. The failure of the Commission to see the question here presented "in clear form" (Memo. pp. 5, 7), is due solely to its own ability to muddy the forensic waters.

2.

The Commission asserts that the Court of Appeals did not resolve the issue as to whether a private right of action may be implied under § 17(a) of the Securities Act. The Court's action, permitting the claim to stand, is an endorsement of such an action, even if a left handed endorsement.

Judicial inertia is thus encouraged at the expense of needless proliferation. The inertia is justified on the basis that it makes little difference if a 10(b)(5) claim is permitted to stand. It does make a difference here where the 10(b)(5) claim is patently nonexistent.

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4. The case should then be sent back to determine the statute applicable to negligence actions; the borrowed statute problem has been uniformly cast in terms of choice of the general common law fraud limitations statute *vis a vis* Blue Sky Laws limitations; cf. *Charney* v. *Thomas*, 372 F. 2d 97 (C. A. 6) and *Vanderboom* v. *Sexton*, 422 F. 2d 1233 (C. A. 8), *cert. denied*, 400 U. S. 852.

3.

Finally, the Commission suggests that the Court may wish "to hold this petition" pending its disposition of the question as to whether limitations begin to run from the time of discovery or cessation of the fraudulent acts. This is the question that the Commission deems to be posed by *Ernst & Ernst* v. *Hochfelder*, No. 77-1042. This is an inapt description of the question posed by *Ernst & Ernst* which, in full, is as follows:

> "2. Whether the statute of limitations applicable to Respondents' cause of action against Petitioner may be tolled by Petitioner's alleged 'negligent facilitation and implementation of fraud' in the absence of any allegation of deliberate or intentional fraud or reckless or willful conduct or of knowledge of such fraud or conduct on the part of Petitioner?"

Rodman's question presented is as follows:

> "Whether, if the limitations period of the forum state is to be applied, the period should be tolled as to defendant whose liability is derivative and vicarious and is not predicated upon complicity in the fraudulent scheme but upon negligence facilitating the fraud?"

In support of this question, Rodman has presented argument and authority not mentioned in the *Ernst* petition and certainly relevant to decision of this basic point. To insure a forum for this argument, Rodman's petition should be granted, not held in abeyance. Further, the question as presented in *Ernst* and here is not as simple as the Commission would have it. The question is rather as to whom does the statute run and as to whom is it tolled. Petitioner's authority is that the statute (when the statute is borrowed) runs as to a defendant vicariously liable but not as to the active offender. This position has not been fully presented in the *Ernst* case.

4.

The Commission casually (Memo. p. 5) references, as reinforcing its argument, the case of *Blue Chip Stamps* v. *Manor Drug Stores*, 44 L. Ed. 2d 539, decided June 9, 1975, since the filing of Rodman's Petition herein.

It is submitted that the decision neither supports nor reinforces any position expressed by the Commission here. The decision expressly buttresses Petitioner's position.

The Court there, 44 L. Ed. 2d 549, 550, reviewed the "principal express nonderivative private civil remedies" under the 1933 and 1934 Securities Acts, emphasizing their applicability to purchasers and sellers concluding:

> "It would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action."

Here the anomaly is to expand the limitations period for a judicially implied cause of action beyond the bounds it (Congress) delineated for the *same*, not a comparable, express cause of action.

And, at 44 L. Ed. 2d 552, the Court referred to the burdens placed on explicit rights of action as a factor limiting suit "in an action wholly implied from the language of the 1934 Act." Cf. § 9(e)'s provisions permitting the court to require an undertaking for costs and for attorneys' fees of either litigant, establishing rights of contribution and limiting the time within which suit could be brought.

The concurring opinion, 44 L. Ed. 561 emphasized, as does Petitioner here, the language of the statute and the fidelity of its legislative history to the result. Those same considerations support Petitioner in the present case. That same history was elaborated by the dissent, 44 L. Ed. 2d 556, 567, and a conclusion contrary to the majority was there reached, but not in respects contrary to Petitioner here.

CONCLUSION.

It is understandable that the Commission's underlying bias as an enforcement agency would be against the enforcement of statutory limitations.[5] Yet those limitations periods are as significant in terms of Congressional policy as its commandments of fair dealing and full disclosure enforced by the Commission.

The policy reflected in enactment of limitations periods is much the same as that served by the Securities Acts. The potential for abuse involved in suits, such as the present one, where the events relating to Petitioner occurred in 1965 is eliminated by enforcement of that policy.

The Petition for certiorari should be granted.

Respectfully submitted,

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5. The Commission's willingness to expand § 10(b)5 at the expense of its "precise language" provoked this Court's description of the SEC's position as "curious" and "surprising(ly)" in *Blue Chip Stamps* v. *Manor Drug Stores,* 44 L. Ed. 2d at 563.